

ALLEN B. ELLIS
ELLIS, BROWN & SHEILS, CHARTERED
Attorneys-at-Law
707 North 8th Street
P.O. Box 388
Boise, Idaho 83701-0388
208/345-7832 (Tel)
208/345-9564 (Fax)
ISB No. 1626

FILED OCT 05 '04 PM03:37 USCTID

Attorneys for Intervenor

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

RECUPEROS, LLC, an Idaho limited
liability company,

Plaintiff,

vs.

AMERICAN FOOD STORES, LLC, a
California limited liability company,

Defendant.

AMERICAN FOOD STORES, LLC, a
California limited liability company,

Counterclaimant,

vs.

RECUPEROS, LLC, an Idaho limited
liability company,

Counterdefendant.

Civil No. 04-229-S-BLW

SUPPLEMENTAL MEMORANDUM IN
SUPPORT OF MOTION TO INTERVENE

THE NATURE OF COMPLAINT IN INTERVENTION: The plaintiff in this action seeks
a declaratory judgment that, with respect to the earnest money paid by defendant American Food

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE - 1

Stores, LLC ("AFS"), plaintiff is entitled to retain the earnest money notwithstanding that the purchase and sale agreement has not been consummated. The proposed complaint intervention alleges that intervenor Pahwa advanced the money to enable AFS to make the earnest money deposit. It further alleges that in the event this Court adjudges that plaintiff must disgorge the money that there be a further adjudication that Pahwa, as the advancing party is entitled to those funds.

CRITERIA TO QUALIFY FOR INTERVENTION OF RIGHT: To paraphrase Rule 24(a) with respect to intervention: Criteria must be satisfied:

1. The applicant must have an interest in the settlement matter litigation;
2. Absent intervention, the applicant's interest will be impaired or impeded; and
3. The existing parties to the action inadequately represent the applicant's interest.

Paragraphs III and IV of the proposed complaint intervention allege:

III

That with respect to the "initial payment" of \$306,155.15 referenced in the third affirmative defense of defendant's answer and the \$296,155.15 referenced in ¶ 13 of the verified complaint, intervenor Pahwa advanced this money (\$296,155.15) to defendant American Food Stores, LLC ("AFS") so that it could make the aforesaid deposit to plaintiff Recuperos, LLC ("plaintiff") in connection with the Asset Purchase Agreement referenced in ¶ 9 of the verified complaint and ¶ 3 of defendant's counterclaim.

IV

That in the event there is an adjudication herein that the aforesaid deposit should be disgorged by plaintiff, intervenor Pahwa seeks further adjudication that such money be returned to him on the grounds that remitting the money to AFS would constitute unjust enrichment to and conversion by defendant AFS.

The applicant Pahwa has alleged an interest in the subject matter of litigation, i.e. the deposit money concerning which plaintiff seeks an adjudication that he is entitled to retain. Absent

intervention, if the plaintiff is required to disgorge the deposit monies, they will be disgorged to defendant AFS with no assurance that AFS will voluntarily transfer the funds to the applicant. Neither the plaintiff Recuperos nor the defendant AFS have an interest in this matter which is substantially similar to applicant Pahwa. For that reason, the assertion of their respective positions "will not be adequate to represent the applicant's interest in his retrieval of the deposit money.

ALL WELL-PLEADED, NON-CONCLUSORY ALLEGATIONS ARE ACCEPTED AS

TRUE: According to Moore's Federal Practice and the cases decided therein:

"... the court will accept as true all well pleaded, non-conclusory allegations in the motion to intervene in the proposed complaint ... absent sham, frivolity, or other objections."

Moore's Federal Practice 3D § 24.03[1][a], p. 24-24.

THE APPLICANT PAHWA HAS A JUDICIALLY RECOGNIZED INTEREST IN THE SUBJECT MATTER OF LITIGATION: The applicant Pahwa alleges an interest in the earnest money deposit which both the plaintiff and defendant claim an entitlement to. It is undisputed that applicant advanced the money in question. According to Moore's Federal Practice, it is this type of interest concerning which a complaint intervention is particularly appropriate:

Applications to intervene in which the proposed intervenor advances a clear property interest present the easiest cases for intervention. If an action involves a dispute about a particular property or fund, and an applicant claims a direct, substantial legally protected right to this property or fund, the existence of a sufficient interest is apparent. *For example, an interest in a specific monetary fund supports intervention in an action affecting that fund.*

N. L. Indus., Inc. v. Secretary of the Interior, 777 F.2d 433, 435, (9th Cir. 1985); *Mountain Top Condominium Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 366 (3d Cir. 1995). (Emphasis added.)

The fact that the applicant/intervenor is not in privity of contract with plaintiff does not diminish his interest in the litigation nor neutralize his standing. See discussion on standing below.

THE "IMPAIR OR IMPEDE" REQUIREMENT MANDATES A SHOWING THAT THE INTEREST HOLDER BE INJURED IN A PRACTICAL SENSE:

Moore's Federal Practice addresses the meaning of the term "impair" and "impede".

Impair refers to a domination in strength, value, quality, or quantity. Impede means to obstruct or block. Thus impairment or purported interest or a potential decrease in this value, is typically easier to establish than an impediment, which involves a total obstruction of an interest.

Moore's Federal Practice, 3D § 24.03[3][a].

In the case at bench, if intervenor application Pahwa is not allowed to intervene, he will be forced to assert his claim in another venue, in the event defendant AFS prevails. The possibility of diminution in property satisfies Rule 24 (a). *N. L. Indus., Inc. v. Secretary of the Interior* 777 F.2d 433, 440 (9th Cir. 1985).

THE APPLICANT INTERVENOR HAS STANDING TO INTERVENE. As noted in plaintiff's brief, "at some fundamental level the proposed intervenor must have a stake in the litigation," *Sokogon Chippawa v. Babbitt*, 214 F.3d 941, 946 (7th Cir, 2000). Clearly, the applicant here, as the person providing the earnest money deposit has a stake in the litigation. Further, there is no requirement that there must be privity of contract between the applicant and plaintiff Recuperos. It is precisely in the non-privity situation where a complaint in intervention is appropriate. That is, the applicant has no ability to sue the plaintiff directly but may be injured if the disgorged funds are paid over to AFS and are dissipated.

THE MOVANT'S APPLICATION IS TIMELY: Although Plaintiff alleges that the motion is not timely, the only consequence of this is the allegation that it will "unreasonably cause a change in litigation strategy." It is not clear what litigation strategy plaintiff has reference to.

Based upon the foregoing, application's motion for intervention should be granted.

DATED this 6th day of October, 2004.

ELLIS, BROWN & SHEILS, CHARTERED


Allen B. Ellis

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 6th day of October, 2004, I caused to be served a true and correct copy of SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE by the method(s) indicated below, and addressed to the following:

R. Wade Curtis, Esquire
BELNAP & CURTIS, PLLC
1401 Shoreline Drive, Ste. 2
Post Office Box 7685
Boise, Idaho 83707


Attorneys for Defendant/Counterclaimant

☒ U.S. Mail
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile at
208/345-4461

Michael O. Roe, Esquire
MOFFATT, THOMAS, BARRETT, ROCK
& FIELDS, CHARTERED
101 S. Capitol Blvd, 10th Floor
Post Office Box 829
Boise, Idaho 83701-0829

Attorneys for Plaintiff/Counterdefendant

☒ U.S. Mail
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile at
208/385-5384


Allen B. Ellis